APPENDIX

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1911

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL McCARTHY, RONALD UGINCHUS, and HAROLD DURKEE,

Defendants-Appellants.

ORDER [entered May 28, 1975, by Chief Judge Fairchild and Circuit Judges Pell and Tone] [Unpublished per Seventh Circuit Rule 28].

In this appeal from their convictions on charges of extortion and conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, defendants raise essentially eight separate issues. Finding no reversible error, we affirm the convictions.

Issues I, II and III

On three different grounds, defendants challenge the sufficiency of the evidence. First, they allege that a defense of entrapment was established as a matter of law. The government counters that the entrapment defense should be rejected as a matter of law, for, says the government, whatever the object of the "set-up" for Lever-

ence, whether to extort money or obtain an informant, it is clear from the evidence that the defendants were not entrapped by Bodie into their subsequent course of conduct, although he provided the opportunity for the offense. Compare *Sherman* v. *United States,* 356 U.S. 369, 373 (1958), with *United States* v. *Smith,* 508 F.2d 1157 (7th Cir. 1975).

The Supreme Court has stated in *Sorrells* v. *United States,* 287 U.S. 435, 441-442 (1932):

> ". . . the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution . . . . A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

See also *United States* v. *Russell,* 411 U.S. 423, 433-436 (1973); *United States* v. *Smith, supra,* 508 F.2d at 1158; *United States* v. *Haden,* 397 F.2d 460, 466 (7th Cir. 1968), *cert. denied,* 396 U.S. 1027 (1970).

Here the evidence does not establish entrapment as a matter of law. We need not decide whether it establishes that as a matter of law there was no entrapment, because the trial judge submitted the issue to the jury with appropriate instructions, and there was ample evidence to support its rejection of the defense of entrapment. Bodie, a paid federal informant, apparently first brought to defendant McCarthy's attention the fact that Leverence was vulnerable to a "set-up." But there was evidence from which the jury could have found that it was McCarthy who for several years "repeatedly asked Bodie to help him 'set-up' Leverence," and it was not until the summer

of 1973 that Bodie finally contacted McCarthy and "asked McCarthy whether he still wanted to get Leverence." This evidence indicated that Bodie did not induce McCarthy to commit the offense, and that in fact it was McCarthy who pressed Bodie to participate in the "set-up" scheme over a period of years before Bodie agreed to cooperate. The evidence amply supported the jury's resolution of the issue of entrapment against defendants.

Defendants' second argument regarding the sufficiency of the evidence is that the jurisdictional element of the effect on interstate commerce of the alleged extortion from Leverence of $350 was not proven because the evidence did not show that the money came from legitimate, as opposed to illegally obtained, funds, or that the money would have been used to purchase legitimate merchandise in interstate commerce. That Leverence bought substantial amounts of jewelry and other merchandise from outside Illinois as part of his legitimate jewelry business was stipulated by the parties. The reasoning of the tavern-owner extortion cases applies here: although a portion of Leverence's business was illegal and some of his funds thus illegally obtained, the "depletion of . . . [his] assets by the . . . money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of" legitimate merchandise, in this case jewelry and supplies, "moving into Illinois." *United States* v. *DeMet,* 486 F.2d 816, 821 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); see *United States* v. *Gill,* 490 F.2d 233, 236-237 (7th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974); see also *United States* v. *Augello,* 451 F.2d 1167, 1169 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). Defendants cite no cases to the contrary. Thus, we conclude that the jurisdictional requirement of effect on interstate commerce was satisfactorily demonstrated.

The third contention concerns only the sufficiency of the evidence as to defendant Durkee. Regardless of whether Durkee was involved from the outset, and there is some evidence from which the jury could have inferred that he was, it was unnecessary for the government to prove that he was a member of the conspiracy at its inception, if it proved he later became a member. *United States* v. *Hickey,* 360 F.2d 127, 138 (7th Cir. 1966), *cert. denied,* 385 U.S. 928 (1966). The record contains evidence that Durkee participated in planning discussions in the Garrick Restaurant and in McCarthy's car on the way to Leverence Jewelers, and that he actually participated in carrying out the extortion itself by handing Bodie the camera and giving him some final instructions, by placing Leverence under arrest and later telling him he could probably beat the charge but did not need the aggravation, by asking Leverence "what it was worth for them to forget about it," by bargaining for a payment larger than $350, by agreeing to the $350 after consulting McCarthy, by accompanying Leverence on the trip to the bank, and by accepting the payoff money and giving Bodie his $90 share of it. It was of course unnecessary to prove a formal agreement to participate in the conspiracy. See *United States* v. *Robinson,* 470 F.2d 121, 123 (7th Cir. 1972).

Issues IV and V

The defendants contend that the trial court improperly and prejudicially restricted the scope of their cross-examination of the two leading government witnesses. First, they argue that it was an abuse of discretion not to permit them to cross-examine Leverence as to a conviction, occurring 10 years earlier when he was 19 years old, based on fraudulent use of a credit card, on the theory that it "involved dishonesty" and thus had a direct bearing on his testimonial credibility. The trial court conducted a

voir dire on the proposed testimony and ruled that it should be excluded. Even though the Federal Rules of Evidence are not yet in effect, we turn to Rule 609 for guidance, as we have directed the district courts to do (*United States* v. *McCarthy*, 445 F.2d 587, 590 (7th Cir. 1971)). We assume the conviction in question comes within the scope of admissibility described in paragraph (a) of Rule 609, but it would not be admissible, by reason of paragraph (b) of that rule, because it occurred over 10 years ago, "unless the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." Because of this presumption of inadmissibility for convictions more than 10 years old, the fact that the offense was committed when Leverence was only 19 years old, and the admission of other, much more persuasive impeachment evidence which made evidence of the early conviction merely cumulative in its impeachment effect, restriction of cross-examination on this subject was not an abuse of discretion.

Defendants also complain that the trial court restricted their cross-examination of Bodie. This claim is completely without merit. At no time did the trial court limit the questioning of Bodie. Rather, as the transcripts show, the defense attorneys made a tactical choice not to ask the court to instruct the recalcitrant witness to answer the question, and by not pressing the questioning on the subject the witness' use of drugs any further.

Issue VI

Defendants argue that Count II of the indictment was legally insufficient to charge a violation of the Hobbs Act because it failed to allege the elements of a Hobbs Act conspiracy. First, the indictment is said to have failed to

allege a conspiracy aimed at obstructing commerce, as opposed to extortion. This argument has been explicitly rejected by this court in *United States* v. *Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), *cert. denied,* 390 U.S. 944 (1968), which is controlling here. Second, defendants argue that the indictment was defective because it failed to allege the commission of an overt act. By alleging specifically that defendants did "unlawfully obtain and cause to be obtained . . . various sums of money, which money was not due them . . . and was obtained by the defendants from William Leverence, with his consent, said consent being induced by fear of economic harm . . .," the indictment in effect, though not in as many words, alleged an overt act. An allegation of an overt act is not required, however, where the offense alleged is a section 1951 conspiracy. Defendants' argument to the contrary has been rejected by the Fifth Circuit in *Ladner* v. *United States,* 168 F.2d 771, 773 (5th Cir. 1948), *cert. denied,* 335 U.S. 827 (1948), which rests on a line of Supreme Court cases holding that statutes "punish[ing] conspiracy 'on the common law footing'" do "not require an overt act for the offense . . . ." *Singer* v. *United States,* 323 U.S. 338, 340 (1944); *Nash* v. *United States,* 229 U.S. 373, 378 (1913). These cases are controlling here.

Issues VII and VIII

In light of our holding on Issue VI, *supra,* that an overt act need be neither alleged nor proven under section 1951, we do not reach the questions raised by defendants' remaining arguments that there was a fatal variance between the indictment and the instructions concerning the necessity of proving an overt act and that a reversal on Count II necessitates reversal of Count I as well.

AFFIRMED.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1911

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL McCARTHY, RONALD UGINCHUS, and HAROLD DURKEE,

Defendants-Appellants.

ORDER entered June 26, 1975, by Chief Judge Fairchild and Circuit Judges Pell and Tone, denying petition for rehearing and suggestion for rehearing in banc.

APPENDIX C

(Summary of Additional Facts)

James Bodie, an admitted "fruit hustler,"[1] for the past ten years had regularly sold stolen merchandise to various persons, (Tr. 80-83), including William Leverence. (Tr. 10, 35-36, 78, 83) Bodie admittedly engaged in the sale of marijuana (Tr. 30, 87, *cf.* 117), and, at the time he testified,[2] was on three years' probation for aggravated battery[3] (Tr. 47, 220). Bodie had known defendant McCarthy for at least six years, having from time to time supplied officer McCarthy with information about criminal activities. (Tr. 36, 76, 993) Bodie had also been acting as an informer for Federal Agent Cavanagh for about the past ten years. (Tr. 17, 317, 423)

Bodie testified for the government that the name "William Leverence" had first come up between himself and defendant McCarthy some six years before 1973, when

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[1] Bodie testified that he would "hustle fruits" whom he met at the Greyhound Bus Station in Chicago, by which he meant, according to his testimony, that he would pretend to accompany men to a hotel room for homosexual conduct, and then would rob them of watches, jewelry and other valuables under threats of violence or public exposure. (Tr. 85-86, 238-43). He sold these items to "fences," such as Leverence. (Tr. 78) Leverence knew of Bodie's activities in this regard. (Tr. 684-91)

[2] Bodie admittedly received $290 from federal agents in connection with his cooperation and testimony in this cause. (Tr. 37). Additionally, he received $60 in witness fees, plus $20 for each interview at the federal building. (Tr. 164-66)

[3] Moreover, Bodie had not reported to his probation officer since September, 1973, although he was still required to do so by the terms and conditions of his probation. (Tr. 226)

Bodie had advised McCarthy that he (Bodie) sold some of the items he stole to Leverence, a jeweler. (Tr. 8-10, 78) Bodie mentioned Leverence's name initially. (Tr. 78) Bodie testified that from time to time during the next six years, McCarthy repeatedly asked Bodie to help him "set up" Leverence, by having Bodie sell Leverence some "hot" property, then having McCarthy confront Leverence with the prospect of arrest for receiving stolen property or a payoff to the police. (Tr. 7-13, 48-49) During the summer of 1973, Bodie was in need of money, and asked McCarthy whether he still wanted to get Leverence. (Tr. 15-16; *cf.* Tr. 112-14) McCarthy (according to Bodie) responded in the affirmative, and they arranged to "set up" Leverence on September 3, 1973. (Tr. 116) Defendant Uginchus was present but was not a party to the conversations between Bodie and McCarthy when this was discussed. (Tr. 14-16)

Bodie then contacted federal agent Cavanagh by phone [4] and related the plan to him (Tr. 17-19, 317-19); Cavanagh asked that the meeting be postponed. (Tr. 19, 319) It was eventually delayed until September 10, 1973. (Tr. 19-21, 143-45)

On September 10, 1973, federal agents (including Cavanagh) equipped Bodie with a concealed microphone and radio transmitter, with the agents having a receiver and recording device concealed in an attache case, which receiver was adjusted to pick up transmissions from the transmitter on Bodie's person. (Tr. 23, 147, 326-29)

Bodie met all three defendants at the restaurant above the Greyhound Station (Tr. 24-27), and they proceeded to

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[4] Apparently, Bodie's anger at a remark (calling Bodie a "fucking punk") made by Uginchus precipitated Bodie's contacting agent Cavanagh. (Tr. 109, 111-12)

the Mallers Building, wherein Leverence's jewelry store was located. (Tr. 28-30). Bodie had never seen petitioner before. (Tr. 26-27) While Bodie went into Leverence's offices, federal agents waited outside, unseen, recording the transmissions.[5] (Tr. 336-37, 415-17) After some preliminary negotiations, Leverence purchased a presumably stolen camera lens from Bodie for $50 (Tr. 151-52), which sum he paid by check to Bodie. (Tr. 29-30, 639) While Bodie testified that defendants supplied the item to be sold to Leverence, (Tr. 15-16, 28), the officers all testified that Bodie himself had supplied the property, having turned it over to McCarthy and Uginchus previously for that precise purpose. (Tr. 1011, 1026)

After Bodie emerged from Leverence's office, defendants entered and told Leverence he was in legal trouble for having bought the lens from Bodie. (Tr. 31, 639-43) Leverence, McCarthy and Durkee went into Leverence's private office, while Bodie and Uginchus waited in the outer office. (Tr. 31-32, 645-49) (The conversation in this private office is not corroborated by any tapes.)

Leverence testified that the officers told him he "would have to go downtown," *i.e.*, to the police station, to be booked and charged with receiving stolen property unless he gave them money. (Tr. 644-49) After an abortive attempt to get money from his bank, (Tr. 652-53), Leverence pretended to borrow $350 cash from another jeweler in the Mallers building, but in fact, according to his testi-

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[5] Government's Exhibits 2, the tape itself, and 3 (as revised), the transcript thereof, were admitted upon stipulation of accuracy. (R. 44) The tape and transcript include conversations in the restaurant before Bodie and defendants went to the Mallers Building, and in Leverence's outer office.

mony, obtained it from his safe. (Tr. 34, 653-54) Leverence gave petitioner an envelope containing $350 (Tr. 655) which, according to Bodie, was divided among himself (receiving $90) and the officers. (Tr. 34-35) Nothing regarding any "split" of the money appeared on the tapes. (Tr. 405-06) Bodie was not under surveillance for at least 20 minutes after he left defendants and before he reported to Cavanagh. He had had a drink at a bar in the interim. (Tr. 35, 269-71, 437-39) Bodie turned $90 over to Cavanagh. (Tr. 338, 449) Cavanagh did not search Bodie for any additional money. (Tr. 422-23) According to defendants, 100% of the money was given to Bodie, (Tr. 1036-38, 1148-49, 1208-09), since their interest was solely in gaining Leverence's future cooperation as an informer concerning various burglaries and receipt of stolen property involving persons in the Mallers Building. (Tr. 1031-32, 1068, 1130, 1203-09).

Substantial uncontroverted evidence adduced by the prosecution as well as the defense established that law enforcement officers' reliance upon undercover civilian informants is a commonly accepted law enforcement practice, that developing persons to act in such capacity is frequently a necessary part of police work, and that the need to rely upon such individuals is particularly great in order to solve "non-eyewitness" crimes such as burglary. (Tr. 519, 546-47, 936-79) [6]

The court refused to permit defense counsel to cross-examine Leverence concerning his prior conviction in the State of California for fraudulent use of credit cards. (Tr. 617-29, 662-73)

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[6] All cited testimony in this regard is from witnesses other than defendants.

The court interrupted defense cross-examination of Bodie regarding his immediate past use of drugs and controlled substances [7] (Tr. 157), and Bodie refused to answer pertinent questions posed later during cross-examination regarding his present and immediate past use of various "hard" drugs.[8] (Tr. 244)

All defendants testified. McCarthy's testimony was that Bodie instigated the events concerning Leverence, and that Bodie furnished the merchandise sold to Leverence. (Tr. 1014-1153) All the officers testified that their purpose was not to obtain any money from Leverence, but solely to gain information regarding criminal activity known to Leverence in and about the Mallers Building, (Tr. 1031-32, 1068, 1130, 1203-09), particularly concerning a large jewelry theft therein, to which still-open burglary investigation McCarthy had been assigned. (Tr. 987-90, 999-1000) All defendants testified that Bodie alone got all the money which had been obtained from Leverence, and put it in his (Bodie's) shoe. (Tr. 1036, 1148, 1153, 1209-11) While Uginchus had been in McCarthy's company during some

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[7] After Bodie had admitted previous marijuana use, Bodie answered defense counsel's question, "When did you stop [smoking marijuana]," by stating. "That is my own personal business and none of yours." (Tr. 157) To: "When is the last time you used marijuana," Bodie replied, "It is none of your business." (Tr. 157) The court then terminated this line of questioning *sua sponte*. (Tr. 157)

[8] Q. [by defense counsel]: Did you ever use any other form of drug or narcotic? Did you ever use speed?
A. [Bodie]: Whatever I used, it doesn't make any difference.
Q. My question simply is—
A. I think what I have done in that field is my business. If I have done drugs, it is my business. It is not anyone's business. It is my own personal business." (Tr. 244)

of the preliminary discussions with Bodie (Tr. 14-6, 1007-08), petitioner, who coincidentally was at the police station when McCarthy and Uginchus were about to leave to keep their appointment with Bodie on September 10, 1973, just happened to go along to assist them in developing Leverence as an informer. (Tr. 1023-24, 1133, 1197-99) McCarthy and Uginchus were assigned to Area 1 Burglary, while petitioner was assigned to Area 1 Robbery, different units of the Chicago Police Department located in the same building (Tr. 1197) at the time of the events in question. (Tr. 986, 1115, 1187). A number of character witnesses testified for each defendant. (See Tr. 890-979)